

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

76-1295

To be argued by
THOMAS M. FORTUIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1295

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UNITED STATES OF AMERICA,

Appellee,

—v.—

ANGELO MAMONE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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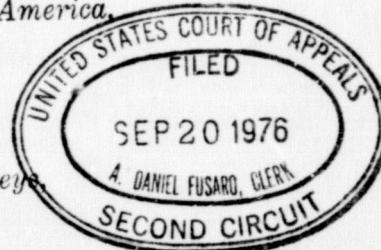


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**United States Court of Appeals
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—♦—
UNITED STATES OF AMERICA,

Appellee,

—v.—

ANGELO MAMONE,

Defendant-Appellant.

—♦—
BRIEF FOR THE UNITED STATES OF AMERICA

—
Preliminary Statement

Angelo Mamone appeals from an opinion and order filed May 28, 1976, in the United States District Court for the Southern District of New York by the Honorable Kevin T. Duffy, United States District Judge, denying without a hearing Mamone's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

Indictment 73 Cr. 1099 filed December 6, 1973, charged Carmine Tramunti and thirty-one others, including the appellant Mamone, in thirty counts with violations of the federal narcotics laws.

* Indictment 73 Cr. 1099 superseded indictments 73 Cr. 931 and 73 Cr. 334 filed October 3, 1973 and April 18, 1973, respectively.

Count One of the Indictment charged all defendants with a conspiracy to violate the federal narcotics laws from January 31, 1969 until December 6, 1973, the date of the filing of the indictment. The remaining counts charged various substantive violations of the narcotics laws, but Mamone was not named in any of these.

The Government proceeded to trial against eighteen defendants.* After an eight-week trial, fifteen defendants, including Mamone, were convicted of conspiracy to violate the federal narcotics laws, and several defendants were also convicted of related substantive offenses.**

This Court affirmed Mamone's conviction and the convictions of twelve co-defendants, concluding that the evidence at trial "established the existence of a large, well organized conspiracy to buy, possess and distribute narcotics in New York, New Jersey and Washington, D.C.," 513 F.2d 1087, 1094 (1975),*** and the Supreme Court denied *certiorari*, 423 U.S. 832 (1975).

On October 31, 1974, Mamone's attorney filed a motion for new trial, claiming that the defendant Joseph

* Prior to trial, three defendants pleaded guilty. The Government severed the cases of the remaining defendants, all but two of whom were fugitives at the time of trial. Two defendants named in the superseded indictment, 73 Cr. 931, Jack Spada and George Toutouian were murdered prior to trial. "Spada was found riddled with bullets and both hands hacked off at the wrists." *United States v. Mallah*, 503 F.2d 971, 976 n.2 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975).

** Judge Duffy entered a judgment of acquittal at the end of all the evidence with respect to the defendant Joseph Marchese. The case against another defendant was severed when he fell down a flight of stairs and fractured his skull during the trial, and the jury was unable to reach a verdict as to a third.

*** This Court ordered that the indictment against one defendant be dismissed and reversed and remanded as to another defendant whose lawyer had died during the course of the trial.

Marchese, a co-defendant who went to trial, was a sham defendant and a "spy in the camp" of the defense who transmitted defense information to the Government. On November 27, 1974, Paul J. Curran, then United States Attorney for the Southern District of New York, submitted an answering affidavit, and on January 30, 1975 Mamone's attorney filed a reply affidavit.

On July 9, 1975 a hearing was commenced on Mamone's motion and thereafter was adjourned to give the Government an opportunity to locate certain records to be submitted to the District Court for *in camera* inspection. On July 23 and 24, 1975, the Government filed and served additional answering affidavits of two Assistant United States Attorneys (A. 73-74)* and a memorandum requesting that the motion be denied without further hearing. At the same time, the records requested by the District Court were filed with the Court *ex parte* along with an *ex parte* affidavit of Paul J. Curran.

On May 28, 1976, Judge Duffy denied the motion without further hearings.

Statement of Facts

The sole evidentiary support for Mamone's claim that the defendant Joseph Marchese was a sham defendant and a "spy in the camp" of the defense who transmitted information concerning defense strategy to the Government was an affidavit submitted and sworn to by Ma-

* References to "A." are to pages of the Appendix of Defendant-Appellant Angelo Mamone; references to "Br." are to pages of Mamone's Brief.

mone's attorney, (A. 5-24). The attorney's affidavit states:

"10. Admittedly, we have no knowledge that Marchese actually transmitted defense knowledge to the Government. (A. 9.)"

He goes on to argue, however, that because Marchese participated as a Government informant in the case of *United States v. Willie Lee Knight* filed in the United States District Court for the Central District of California, a case unrelated to the *Tramunti* case,* there is reason to believe that he acted as a Government informer during the *Tramunti* trial.

The facts which Mamone claims support that inference are as follows: Marchese, while acting as an informant for the New York Drug Enforcement Task Force, had arranged a drug sale to Knight on September 30, 1971. (A. 11-17). Following the trial of the *Tramunti* case, Marchese was to have testified in California in the retrial of Knight, whose previous conviction had been reversed. (A. 5-7). At the last minute, the parties stipulated to Marchese's testimony. (A. 18-21).

The only additional support for the motion was the attorney's statement that:

"[C]ontemporaneous press reports at the time of the arrest of the defendants herein quote Deputy

* Although Mamone claims that Marchese's informant activities in the *Knight* case were conducted "under the aegis of the same Drug Enforcement Administration agents who investigated the *Tramunti* case" (Br. at 9), that is not so. The agents who supervised Marchese's activities in the *Knight* case testified in the *Tramunti* trial about the seizure from the defendant Joseph DiNapoli and co-conspirator Vincent Papa of nearly one million dollars in cash. They played no other role, however, in investigating the *Tramunti* case.

Police Commissioner William McCarthy, speaking at a joint news conference with Mr. Curran, as stating that the investigation of this case 'was code-named operation "Shamrock".' It is not without significance that the private cab company operated by Marchese at the time was called 'Shamrock Cabs.' (A. 8).

In response to Mamone's allegations, Paul J. Curran, the United States Attorney at the time, who participated at the trial of *Tramunti* case, submitted an affidavit swearing that Marchese was a "*bona fide* defendant" and stating:

"I have discussed this matter with the Assistant United States Attorneys who participated with me in the prosecution of this case. None of us and no member of the United States Attorney's Office has any knowledge whatsoever that the defendant Joseph Marchese cooperated in any way or form with the Government in this case. During the course of the trial, the Government received no information either from Marchese or from any other source concerning any conversations between defendants and their attorneys or with respect to any defense tactics." (A. 26).

In reply, Mamone's attorney submitted another affidavit sworn to by himself, dated January 30, 1975 (A. 29-32), providing as follows:

"On November 6, 1974, I interviewed an obviously frightened and recalcitrant Marchese in my office. Although Marchese denied acting as an informant in this case, such denial is entitled to no weight for he also initially denied that he was an informant in the California case of Willie Lee

Knight, or, for that matter, in any other case." (A. 30).*

Judge Duffy ordered a hearing on the motion, and the hearing began on July 8, 1975. The Government called Walter M. Phillips, Jr. as its first witness. At the time of his testimony Phillips was Deputy Attorney General for the Commonwealth of Pennsylvania, more commonly known as Special Prosecutor. As Chief of the Narcotics Unit in the United States Attorney's office for the Southern District of New York, he had been involved with the Tramunti investigation and prosecution from the outset of the investigation. (A. 54-55). Phillips

* Significantly, Marchese did admit to having certain casual conversations with the Assistant United States Attorney Walter M. Phillips, Jr. and Drug Enforcement Administration Agent Torrey Shutes, none of which in any way related to defense strategy. The defense counsel's affidavit related these conversations as follows:

"In any event, during the course of the interview Marchese said that he:

- a) was questioned extensively before trial by the government about each of the defendants in this case;
- b) was told by Assistant United States Attorney Walter M. Phillips that he would receive \$100,000 in cash, a home in any location he wanted to live and a new identity if he cooperated;
- c) was directed by Phillips to contact Agent Shutes of the Drug Enforcement Administration if he had anything to report to Phillips;
- d) was periodically asked during the trial by Shutes how the defendants were treating him and whether any of them threatened him;
- e) was regularly questioned by Shutes after he began bringing newspapers, magazines and lunch for some of the jailed defendants; and
- f) was forbidden in February, 1974, by Phillips to go to California to testify in response to a subpoena served in the Knight case." (A. 31.)

testified that in October 1973 he had attempted to get Marchese to give information and testify with respect to the defendants named in the *Tramunti* indictment, but that Marchese had steadfastly refused. (A. 55-58). Thereafter, Phillips had no further personal conversations with Marchese, so far as he could recall, and received no messages from Marchese through any other person. (A. 58-60).

During the cross-examination of Phillips, Judge Duffy adjourned the hearing until such time as the Government could locate and produce for *in camera* inspection a so-called "informant's file" maintained by the Drug Enforcement Administration with respect to Marchese's activities as an informant. (A. 72, A. 50).

Shortly after the hearing, on July 23 and 24, 1975, Assistant United States Attorneys Thomas E. Engel and Thomas M. Fortuin, the two Assistants who had assisted Messrs. Curran and Phillips in the trial of the *Tramunti* case, filed affidavits with the District Court swearing that at no time, from the time they were sworn in as Assistant United States Attorneys until the date of the verdict in the *Tramunti* case, "did anyone relate to me any conversations they had had with Marchese, nor did I receive any messages from him either directly or indirectly." (A. 73-74).

At the same time the Government served and filed a memorandum of law arguing that no further hearing was required and submitted to the District Court *ex parte* a second affidavit of United States Attorney Paul J. Curran along with certain exhibits, including Marchese's informant file.*

* On July 12, 1976 Judge Duffy ordered that Mr. Curran's affidavit and the documents transmitted to the court therewith were to be sealed and deposited in the vault of the clerk of the District Court. On July 19, 1976, Judge Duffy ordered that the documents be removed from the clerk's vault and transmitted to the Clerk of the Court of Appeals, the documents to be unsealed only by a Judge of this Court.

On May 26, 1976, Judge Duffy filed an opinion and order denying the motion for new trial without further hearing. (A. 79-82). Judge Duffy indicated that he directed a verdict of acquittal against Marchese over the Government's "strong opposition" based "solely on an analysis of the evidence produced against Marchese." (A. 80). Judge Duffy reviewed the informant's file and found that "there is nothing contained therein which would remotely suggest that Marchese acted as an informant in this case." (A. 81). Judge Duffy stated:

"Examining the law in this Circuit, it appears that the defense must make some showing first, that the alleged 'spy-defendant' was a confidential informant; second, that the informant was used by the government to intrude upon the attorney-client relationship, and, third, that the intrusion prejudiced the other defendants in some way. *United States v. Arroyo*, 494 F.2d 1316 (2d Cir.), cert. denied, 419 U.S. 827 (1974); *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974); *United States v. Mosca*, 475 F.2d 1052, 1061-62 (2d Cir.), cert. denied, 412 U.S. 948 (1973). The Circuit has rejected an approach of *per se* reversal unless there is some evidence that the government knowingly planted the informant with the intention of learning defense strategy. *United States v. Rosner*, *supra*, at 1223-29.

It would, perhaps, be unreasonable for this Court to require submission of extensive proof on each and every element of the defense claims before granting an evidentiary hearing. The purpose of a hearing is to give the parties an opportunity to develop such proof. But here virtually nothing has been produced which would warrant a further evidentiary hearing. The defense can-

didly admits that 'we have no knowledge that Marchese actually transmitted defense information to the government.' (Ellis Affidavit at par. 10). Although not dispositive of the matter, one defense attorney has acknowledged questioning Marchese as to his possible role as an informant and he has denied giving any assistance to the government.

The denial of hearing on the Marchese question is without prejudice to a renewal of the defendant's application should be proper minimum showing be made." (A. 81-82).

Mamone submitted no further papers to the District Court, and on June 7, 1976, he filed a notice of appeal.*

ARGUMENT

POINT I

The District Court Properly Denied Mamone's Motion Without a Hearing.

Mamone claims that the District Court erred in denying his motion for a new trial without a full hearing. This claim is meritless. Mamone's attorney offered nothing in his affidavits which if offered at a hearing would be admissible proof entitling him to relief. He supplied only hearsay, generalities and fanciful speculations. Under these circumstances, no hearing was required.

* Although all thirteen defendants whose convictions were affirmed by this Court sought to join in Mamone's motion in the District Court (A. 46), only Mamone chose to appeal.

The sole evidentiary support for Mamone's motion were the two affidavits sworn to by Mamone's attorney: one dated October 30, 1974, and a reply affidavit dated January 30, 1975.

The first affidavit candidly conceded that the defense had no actual knowledge that Marchese had transmitted any information to the Government about the *Tramunti* case. Indeed, the lawyer's reply affidavit established that Marchese himself denied the allegation.

The motion was based upon the conjecture that since Mamone acted as an informant in another case, he must, of necessity, have acted as an informant during the trial of the *Tramunti* indictment. This inference is supported neither by logic nor by experience.*

In any event, Mamone's surmises are based on nothing but the hearsay assertions of his attorney. Such statements do not qualify as proper evidentiary matter to support a motion for a new trial, because they would not be admissible proof at a hearing entitling him to relief. *Dalli v. United States*, 491 F.2d 758 (2d Cir. 1974); *D'Ercole v. United States*, 361 F.2d 211, 212 (2d Cir.), cert. denied, 385 U.S. 995 (1966). See also, *Michel v.*

* See, for example, *United States v. Huss*, 482 F.2d 38, 45 (2d Cir. 1973) where an informant participated in two major bombings even while serving as an informant, and *United States v. Koss*, 506 F.2d 1103, 1110-1112 (2d Cir. 1974), cert. denied, 420 U.S. 977 (1975); *United States v. Corallo*, 413 F.2d 1306, 1320-21 (2d Cir.), cert. denied, 396 U.S. 958 (1969); *United States v. DeSapio*, 435 F.2d 272, 282 (2d Cir. 1970), cert. denied, 402 U.S. 999 (1971) and Judge Mulligan's comment on the reliability of informants in *United States v. Super*, 492 F.2d 319, 322 (2d Cir.), cert. denied, 419 U.S. 876 (1974): "informants in drug cases are not Brahmins, nor are they noted for long term occupancy of well tended premises."

United States, 507 F.2d 461, 464 (2d Cir. 1974); *O'Neal v. United States*, 486 F.2d 1034, 1036 (2d Cir. 1973); *United States v. Miranda*, 437 F.2d 1255, 1258 (2d Cir. 1971); *United States v. Pisciotta*, 199 F.2d 603, 607 (2d Cir. 1952). An attorney's affidavit, unless based on some personal knowledge of the attorney, is not sufficient to require a hearing. *United States v. Culotta*, 413 F.2d 1343, 1345 (2d Cir.), cert. denied, 396 U.S. 1019 (1969); *United States v. Gillette*, 383 F.2d 843, 848-49 (2d Cir. 1967); *Chengwai v. United States*, 125 F.2d 915 (2d Cir. 1942). In these circumstances, Judge Duffy's finding that "here virtually nothing has been produced which would warrant a further evidentiary hearing" (A. 82) is plainly correct. Since "the moving papers themselves [disclose] the inadequacy of the defendant's case, the opportunity to present witnesses would clearly have been unavailing," and there was no necessity for a hearing. *United States v. Slutsky*, 514 F.2d 1222 (2d Cir. 1975); *United States v. Johnson*, 327 U.S. 106 (1946); *United States v. Catalano*, 491 F.2d 268 (2d Cir.), cert. denied, 419 U.S. 825 (1974); 8A *Moore's Fed. Practice* § 33.03 [3] (1976 Rev.).

There are additional reasons for affirming the Judge's order. In considering a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, the Court may consider the affidavits submitted by the Government. *United States v. Johnson*, 327 U.S. 106 (1946); *United States v. Magnano*, Dkt. No. 76-1011, slip op. 5471, 5482 (2d Cir. September 7, 1976); *United States v. Persico*, 339 F. Supp. 1077, 1083 (E.D.N.Y.) aff'd on opinion below, 467 F.2d 485 (2d Cir. 1972), cert. denied, 410 U.S. 946 (1973); *United States v. Astore*, 309 F.2d 144 (2d Cir. 1962); *United States v. Troche*, 213 F.2d 401 (2d Cir. 1954); *United States v. On Lee*, 201 F.2d 722 (2d Cir.), cert. denied, 345 U.S. 936 (1953); Cf. *United States v. Franzese*, 525 F.2d

27 (2d Cir. 1975); *Dalli v. United States, supra*, 491 F.2d at 762 n.4. In this case the four lawyers who represented the Government at the trial, including the United States Attorney and the Chief of the Narcotics Unit at the time, submitted affidavits in the most explicit and broad terms indicating that they had not received any communication either directly or indirectly from Marchese or from anyone else with respect to defense strategy during the pendency of the proceedings. Taking these undisputed affidavits, together with the documents submitted by the Government relating to Marchese's activities as an informant (A. 34-35), there was abundant support for the conclusion of the District Judge that "there is nothing contained therein which would remotely suggest that Marchese acted as an informant in this case." (A. 81).

POINT II

The Submission by the United States Attorney of an Ex Parte Affidavit Was Completely Proper.

Mamone also complains that the Government submitted to the Court *ex parte* the affidavit of Paul J. Curran, the United States Attorney at the time, along with certain exhibits. He claims, erroneously, that his first knowledge that the Government would make an *ex parte* submission to Judge Duffy came on July 1, 1976 in the course of the docketing of this record for the appeal. The record plainly indicates, however, that the Government had informed counsel and the court that it would submit Marchese's informant file to the district court for *ex parte* examination (A. 43, A. 51, A. 72), and Judge Duffy's opinion plainly reflects that he reviewed the informant's file in reaching his decision. (A. 81). The reasons for submitting these papers *ex parte* are fully set forth in Mr. Curran's affidavit and need no

further amplification here. The procedure is in accord with that approved by this Court and widely recognized by the District Courts to be a matter of inherent power. See *United States v. Cuomo*, 479 F.2d 688, 693-94 (2d Cir.), cert. denied, 414 U.S. 1002 (1973); cf. 18 U.S.C. § 3500(c).

That it was necessary for the Government to make such a submission, however, indicates why hearings on motions such as Mamone's should be denied without a hearing unless proper evidentiary matter is submitted to support the motion. Too often the Government is required in response to these motions to disclose matter which would otherwise be privileged, such as, as in this case, the identity and existence of informants.

Such a procedure creates grave personal risks to persons like Marchese who may have acted as Government informants in the past and who are now without the benefit of Government protection or relocation. As a practical matter, the Government canno' respond to claims like Mamone's without at least confirming the identity of Marchese as an informant.

The result is to place Marchese's life in danger on the basis of merely fanciful and unfounded allegations. While ultimately the Government may prevail, an unfair and unnecessary risk to Marchese has been created.

* See footnote at p. 2, *supra*.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

THOMAS M. FORTUIN being duly sworn,
deposes and says that he is employed in the office of the
United States Attorney for the Southern District of New
York.

That on the 20th day of September, 1976
he served a copy of the within Brief
by placing the same in a properly postpaid franked envelope
addressed:

Robert L. Ellis
655 Madison Ave.
New York, N. Y. 10021

And deponent further says that he sealed the said envelope
and placed the same in the mail chute drop for mailing at
One St. Andrew's Plaza, Borough of Manhattan, City of
New York.

Thomas M. Fortuin
THOMAS M. FORTUIN
Assistant United States Attorney

Sworn to before me this

20th day of September, 1976

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977